IN THE

Supreme Court of the United States

October Term, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

RICHARD A. WHITING
ROBERT J. CORBER
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

WALTER HERZFELD
CECELIA H. GOETZ
BERNARD J. WALD
HERZFELD & RUBIN
40 Wall Street
New York, N. Y. 10005

STANLEY J. MADDEN
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, California 94104

Attorneys for Petitioner

INDEX

Table of Cases Cited

Table of Statutes Cited

IN THE

Supreme Court of the United States

October Term, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Not one of the four answering briefs * defends the results reached by the Federal Martime Commission on the grounds given by that agency. Nor are these briefs con-

* In referring to the various briefs before this Court the following abbreviated titles are used: "VW Br." (Brief for Petitioner); "US Br." (Brief for the United States); "FMC Br." (Brief for the Federal Maritime Commission); "PMA Br." (Brief for Pacific Maritime Association, Intervenor); "MTC Br." (Brief for Intervenor Maritime Terminals Corporation); "ILWU Br." (Brief on Behalf of International Longshoremen's and Warehousemen's Union as Amicus Curiae in Support of Judgment Below). The same abbreviations are used as in our main brief.

cerned with traditional guides to statutory construction. They urge this Court, regardless of the merits of VW's position, "even if the words of the Shipping Act should be held unambiguously to embrace the formula devised by PMA" (ILWU Br. 8), to refrain from taking any action which "would lead" the "union * * * to resort to economic self-help to obtain a new and 'lawful' contract" (ILWU Br. 2). Waterfront harmony dictates, they say, that nothing be done to bridle PMA's arbitrary and selfish rule.

Apart from dealing with the factual inaccuracies which stud our opponents' briefs, this reply is confined to the sole legal point in the answering briefs not covered in our main brief and to which we now turn.

I

The cooperative working arrangement here involved is not excluded from section 15 because of its tenuous connection with collective bargaining.

A

The Commission's disposition of this contention adversely to PMA should not be upset.

Both PMA and the ILWU strenuously urge that because the Fund has its origin in an agreement with ILWU, the cooperative working arrangement by which PMA allocates its cost is excused from compliance with section 15 (PMA Br. 21-32; ILWU Br. 8-18).

At the very outset it is important to point out that this is not a new contention in this proceeding. On the contrary, precisely this argument was made to the Hearing Examiner, who emphatically rejected it (R. 649-650). He found no merit in PMA's claim "that the Commission does not have jurisdiction of the agreement establishing the

method of collecting the Mech Fund because it is a part of a collective bargaining agreement" (R. 649). Before the Commission PMA renewed its argument that "Congress did not intend section 15 to apply to agreements among members of a bargaining association implementing labor contracts" [Intervener's Answering Brief in Support of Initial Decision of Examiner, 10-14]. The Commission's conclusion, however, that PMA's plan is not under section 15 proceeds on a wholly different ground and makes clear that the plan would have been considered to be covered if it had included "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675).

Thus, if the terms of PMA's arrangement had been somewhat different, the Commission would have taken jurisdiction even though it would still have been an arrangement implementing a collective bargaining agreement. In short, the Commission agreed with the Examiner that "To make a determination that the Agreement is either within or without section 15, the Commission looks to the standards set forth in Section 15. The fact that the agreement (or the parties) may also come within the scope of another statute does not deprive this Commission of jurisdiction" (R. 650) (footnotes omitted).

Accordingly, the contention which PMA and the ILWU urge before this Court is one which the Commission has rejected, and such rejection should be respected as rational, and neither arbitrary nor capricious.

B

PMA's plan forms no part of any collective bargaining agreement.

The fact is that PMA's cooperative working arrangement is not a collective bargaining agreement and does not concern labor-management relations. The arrangement is

solely PMA's; PMA alone decided how the Fund should be raised. Moreover, what influenced PMA in adopting the method of allocation which it did, was the fact that this method best avoided the "danger of being taken over some day by the Union" (R. 472). Under this method the danger was felt to be minimal because

> "the formula the Committee is proposing is an internal one, not one agreed to with the Union, and, even more important, is one that raises an agreed sum of money for an agreed period of time. If any additional fund is to be raised after the conclusion of this agreement, both the amount and the duration of that arrangement will have to be negotiated. The fact that the present Fund would be raised internally by PMA on a tonnage basis is not felt by the majority of the Committee to be a sufficiently influential or dangerous precedent for such future bargaining as to warrant its abandonment" (R. 471).

Yet, in the face of PMA's studied care to shut out the ILWU from playing any role now or in the future in determining how the cost of the Fund should be distributed throughout the industry, both PMA and the Union now invoke the alleged immunity of collective bargaining from outside interference to shroud from inspection the "internal" method devised by PMA. The short answer is that PMA and the ILWU, by their own agreement, have cut themselves off from contending that PMA's cooperative working arrangement is part of a labor agreement or the product of collective bargaining.

No one has suggested that the collective bargaining agreement giving rise to the Mech Fund is a section 15 agreement. Therefore, PMA indulges in pure hyperbole in suggesting that decision of this case in petitioner's favor will mean "that the members of the maritime industry cannot negotiate industry-wide labor contracts which result in new cost items without first obtaining Section 15 approval from the Maritime Commission" (PMA Br. 22) or

that it will require the filing with the Commission of virtually every labor agreement (PMA Br. 30-31). These issues are not raised here and need not be anticipated. Thus, as the Solicitor General points out, PMA's agreement would not be removed from section 15 even if it is assumed, for purposes of deciding this case, "that agreements which relate solely to collective bargaining or labor relations are excepted" (US Br. 31).

C

Industry regulation and collective bargaining are not incompatible.

If the Court, however, were faced with the necessity of reconciling the obligations of the members of PMA as employers, on the one hand, and as regulated carriers and other persons, on the other hand, it would have to conclude that PMA's membership must satisfy both. There is no inconsistency between recognition that exclusive jurisdiction lies in the National Labor Relations Board over collective bargaining in the shipping industry and jurisdiction in the Commission over other aspects of that industry. "Businesses are frequently subject to regulation by several government agencies." *Greater Baton Rouge Port Comm'n* v. *United States,* 287 F. 2d 86, 92 (5th Cir. 1961), *cert. denied,* 368 U.S. 985 (1962). In this connection it should be noted that section 6 of the Clayton Act, 15 U.S.C., section 17, carving out a specific labor exemption from the antitrust laws has no parallel in the Shipping Act.

There are no policy reasons for excluding agreements between maritime companies from surveillance simply because such agreements are ostensibly entered into in the capacity of these companies as employers. The Civil Aeronautics Board, administering a statute derived from section 15, has held that the establishment of an employer collective bargaining association of carriers was a "cooperative working arrangement" and required filing and approval under section 412 of the 1938 Civil Aeronautics Act, now section

412 of the 1958 Federal Aviation Act (49 U.S.C., section 1382), which corresponds to section 15 of the Shipping Act, 1916. *Airlines Negotiating Conference Agreements,* 8 C.A.B. 354 (1947).

Our opponents have attempted to distinguish the decisions of the Civil Aeronautics Board on the ground that this agency is directed "to promote the policies of the Railway Labor Act" (PMA Br. 28, n. 29). But this distinction does not hold water. Despite substantial differences, the Railway Labor Act and the National Labor Relations Act have much in common, particularly the primary purpose of fostering the solution of labor disputes through collective bargaining. Thus, if the Civil Aeronautics Board had a special mandate to promote the purposes of the applicable labor legislation, and if there were a "national policy" against all interference by regulatory agencies with matters related to collective bargaining, the Civil Aeronautics Board would have had more reason, not less, than the Commission, to refrain from exercising control in this area.

A proceeding, the precise converse of this one, constitutes persuasive authority against PMA. *New York Lumber Trade Ass'n* v. *Lacey,* 245 App. Div. 262 (2d Dep't 1935), *aff'd,* 269 N.Y. 595 (1935), *remittitur amended,* 269 N.Y. 677 (1935), *cert. denied,* 298 U.S. 684 (1936). In that case, out of deference to the primary jurisdiction created by the Shipping Act, the courts of New York dismissed a complaint seeking relief from the refusal of steamship lines to accept or deliver freight unless the delivery trucks were manned by members of a particular union. The steamship lines had imposed the requirement for fear of a strike by their employees. Thus, the condition imposed, unlike the PMA tax levied to raise the Fund, was specifically in response to a labor demand. Nevertheless, the New York courts held that the action of the carriers was a practice squarely within the jurisdiction of the Commission's predecessor—a jurisdiction which acceptance of PMA's argument would end.

D

Collective bargaining agreements are not above the law.

The premise underlying our opponents' thesis is that any matter which is an appropriate subject for collective bargaining necessarily lies outside the jurisdiction of the Commission. Because distribution of the cost of the Mech Fund would have been a proper subject for collective bargaining and because, as a result of collective bargaining, it was agreed that the Union would have no share in how such cost is distributed, they would deny any power in the Commission to review the method through which PMA is, in fact, collecting five million dollars a year from our foreign and interstate commerce (ILWU Br. 12-18; PMA Br. 21-22).

But neither labor nor agreements to which labor is a party are above the law. The fact that the substantive content of collective bargaining agreements is left in part unregulated by federal labor relations legislation (29 U.S.C., sections 141 *et seq.*) does not mean that such agreements need not conform to the prohibitions or requirements of other federal statutes.

> "[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

As this Court observed in *Pennington*:

> "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. * * * In such a case the restraint on the product mar-

> ket is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come." 381 U.S. at 663.

Where a union combines with management to restrain competition, it risks losing its own exemption from the antitrust laws, rather than extending such exemption to the other. "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460, 464 (1949).

In pointing out that collective bargaining agreements could contravene the antitrust laws, Mr. Justice Black, in *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797, 809-811 (1945), used language requiring only slight paraphrasing to be equally appropriate here:

> "It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective.
>
> * * *
>
> A business monopoly is no less such because a union participates, and such participation is a violation of the Act."

Congress has not bestowed upon unions complete and unreviewable authority to aid shipping groups in frustrating Congress' announced objectives under the Shipping Act, *i.e.*, bringing these groups under government supervision and control and preventing discrimination among

shippers. A section 15 agreement is no less such even if a union participates—which ILWU did not.

Our opponents assume that if there is a conflict between the obligation to bargain collectively and the obligation to submit collective action to the Commission for review, it is the latter which must yield. This assumption is unfounded. If the antitrust laws, which include a special statutory exemption, remain applicable, *a fortiori,* so does their statutory counterpart, the Shipping Act.

E

Not the antitrust laws but the Shipping Act deals with anti-competitive conduct in the shipping industry.

Our opponents suggest that the antitrust laws provide the appropriate remedy for VW's grievances (PMA Br. 32-35; MTC Br. 5; FMC Br. 17-19). Section 15 should be narrowly construed, they contend, in obedience to the principle that immunity from the antitrust laws is not lightly to be implied. But the reason underlying the rule that anti-competitive conduct should not go unchecked requires, on the contrary, an expansive reading of that section.

No reasons are given by our adversaries for preferring the proscriptions of the antitrust laws to regulation under the Shipping Act. Nor do they endeavor to explain why the objections urged against regulation by the Commission would not apply with even greater force to the assertion of antitrust jurisdiction by the courts. Certainly, there would be the same alleged interference with the processes of collective bargaining, the same supposed peril to the underlying agreement and a far longer period of uncertainty regarding the whole arrangement. True, they suggest that in the courts unions can be joined as parties, but even they would not contend that the ILWU can be taxed with what PMA has done alone.

Undoubtedly, what explains the preference for the alternative method of controlling anti-competitive conduct is

that this would mean continued long and expensive litigation for VW, during which all the pressures which PMA and its allies have available (and of which significant hints are given in the briefs before the Court) can be brought to bear upon VW to compel it to desist. Clearly, here the expectation is that justice delayed will be justice denied. If the issue before the Court were liability of PMA's program under the antitrust laws, indubitably the exclusive jurisdiction of the Shipping Act would be urged with the same vigor as it is now denied.

II

Discrimination gains no sanctity by repetition.

Our opponents place great weight on the claim that the distribution of the cost of the Mech Fund was patterned on PMA's dues collections (PMA Br. 20, 40-42; FMC Br. 6, 20). Even if this were true, it would be irrelevant. What PMA did in the past may be as improper as what it is doing now. But, in fact, the entire argument is a tissue of half-truths and irrelevancies.

In essence, the contention is that the Mech Fund follows PMA's dues practices which, in turn, are based on ocean freight, and that such freight in the case of automobiles is determined by measurement tons.

Assuming *arguendo* that ocean freight is so determined, how does that justify use of the same yardstick for the wholly different purpose of stevedoring and terminal operations? Significantly, PMA's dues do not take over the ocean freight yardstick intact. When the Mech Fund was voted, these dues were predicated on a combination of tonnage and man-hours, not on tonnage alone (R. 473). Man-hours accounted for approximately sixty per cent of PMA's dues and tonnage forty per cent (*ibid.*). Had the Mech Fund collections actually copied the dues assessments,

it is this formula that would have been employed, as a minority of PMA's committee recommended (R. 475-79), with very different results for petitioner and its cargo.

Furthermore, so far as petitioner's cargo is concerned, even the forty per cent of PMA's dues paid on tonnage was calculated on the basis of weight or unit by all the stevedores discharging its automobiles, except MTC. This is established by uncontroverted testimony of PMA's own vice-president. He testified that at the time the Mech Fund was voted every one of the stevedores unloading Volkswagen vehicles were paying dues on the basis of weight, not measurement (R. 84-85, 169-70).* Contemporaneous documentary evidence from PMA's own files show that dues on the Volkswagen automobiles carried by the Wallenius Lines also were paid on the basis of "one (1) unit, and/or one (1) ton" (R. 494).

Although PMA's vice-president named MTC as one of the companies reporting on the basis of weight, when MTC's vice-president in turn took the stand he claimed his company had always paid dues on the basis of measurement tons and, led by PMA's counsel, agreed somewhat hesitantly that VW was aware of this charge (R. 160-61). The charge in question amounted to 2½ cents per ton (R. 524), which on a measurement basis would mean a tax of twenty-five cents per vehicle. The Examiner found: "Admittedly, Volkswagen was aware that the tonnage dues item was included in the rate; that for automobiles the amount of the assessment was computed on a measurement ton

* According to PMA's vice-president, corrected reports were demanded and "many" were received (R. 80-86), but when VW sought to probe this answer and asked for PMA's records, production was avoided on the ground of burdensomeness (R. 86). But even if such corrected reports were filed, the fact remains that until the Mech Fund was voted PMA's dues were being paid on VW's cargo, by everyone but MTC, on the basis of weight, not measurement.

basis; and that Respondents paid tonnage dues to PMA on that basis" (R. 621).*

Taking this finding at its face value and assuming that VW knew that MTC was paying PMA dues amounting to 2½ cents per measurement ton and made no protest, how does that prove that what PMA was doing was right then or is right now? Certainly, no conclusions favorable to PMA or adverse to VW can be drawn from VW's failure to take on PMA as an adversary over a comparatively modest charge, paid by only two of the stevedores discharging its cargo. Obviously, the course of wisdom was to pay the 2½ cents.

It should not be overlooked that there are significant differences between PMA's dues and the Mech Fund collections in addition to the inclusion in the former of a sixty per cent labor factor. Among other things, PMA's dues do not favor scrap metal and coastwise lumber.

But in any event, the issue here is not the legality of PMA's dues nor what PMA has been able to get away with unchallenged in the past, but what restrictions the Shipping Act places on its present conduct. In no way is resolution of that issue aided by insistence upon the purported identity of the Mech Fund assessments with earlier exactions, the legal status of which is entirely obscure.

III

The claim that the record is deficient regarding the impact of the Mech Fund assessment on VW's costs is footless.

Our opponents lay great stress on the asserted failure of VW to establish what the costs of discharging its cargo

---

*In PMA's brief this finding now serves as a basis for such rhetorical flourishes as "Volkswagen fully appreciated and did not complain that PMA's tonnage dues were historically computed on the basis of measurement" (PMA Br. 40).

were before and after the Mech Fund (PMA Br. 9, 16-17; MTC Br. 12-13; FMC Br. 31). MTC also seize on an ambiguous finding by the Examiner (R. 627) to claim that the commodity rate VW paid per car after the Mech Fund assessment went into effect was less than the amount paid prior to the assessment (MTC Br. 7-8; FMC Br. 7). The inference is that despite the assessment VW is paying less to discharge its cars than it did before and, therefore, is suffering no hardship.

A contemporaneous letter written by MTC's counsel and forming part of the record establishes beyond peradventure that the evidence on which the Examiner based his finding, testimony by MTC's vice-president that the commodity rate to VW for discharging its cars decreased after the Mech Fund went into effect (R. 155, 162), necessarily referred to the rate exclusive of the assessment. Recounting in December 1962 what had taken place after the assessment was voted in January 1961, MTC's counsel wrote:

> "Volkswagenwerk refused to pay the assessment on this basis, whether billed as part of the basic stevedoring charge or billed separately. It specifically refused to agree to a new commodity rate which would include the assessment. Its position was that if stevedoring services were billed on a commodity rate basis, the amount of the assessment would be deducted and only the balance paid. Because of Volkswagenwerk's adamant position, Marine Terminals has continued to bill the Mechanization Fund assessments separately. Volkswagenwerk has continued to refuse payment of these assessments" (R. 520).

VW has never contended that the Mech Fund assessment increased its costs by the full amount of the assess-

ment.* Obviously some compensating benefits were received, but as the Commission found after this issue had been extensively explored on the record, these were no greater than what other cargo stood to gain (R. 677). Our opponents are simply attempting to reopen this concluded point.

But if there were any deficiency in the record it would not avail our opponents since it is they who are responsible for it. When VW sought to establish exactly the facts which they now criticize the record for lacking, MTC's counsel, with PMA's acquiescence, blocked the inquiry.**

---

* Our main brief makes exactly the point which our opponents imply we are suppressing, which is that "in negotiating a new [commodity] rate" the fact that "the PMA assessment would necessarily be included did not mean that the new rate would be the old rate plus the PMA assessment" (VW Br. 47).

** After VW's counsel had established through MTC's vice-president what MTC's commodity rate had been prior to the Mech Fund, he sought to develop what MTC was charging currently with the Mech Fund in effect. At this point counsel for MTC vigorously objected:

> "Mr. Zimmerman: Now, I would like to interpose an objection to any further questioning along this line. As I understand, the purpose of this testimony was simply to establish that it was necessary for Marine Terminals to reflect these assessments in its commodity rate, so that ultimately they would be paid by Volkswagen.
>
> I don't believe that there is any question that that is so.
>
> Mr. Horsman has testified that these costs must be reflected because they operate on a cost-plus basis. Now, what the actual amounts are I believe is irrelevant. The costs and commodity rates in the stevedoring industry are highly confidential.
>
> Unless there is some compelling reason for getting those figures on the record, I would object to any further questions along this line.
>
> Mr. Madden: Well, one of the fundamental complaints set forth in this proceeding on the part of Volkswagen is the percentage increase in the cost of discharging Volkswagens, which inevitably results from the imposition of this assessment charge

Finally, our opponents misapprehend upon whom the burden of proof lies regarding the benefits to VW from the Mech Fund. The relationship between benefits and burdens is relevant only to the issue raised under sections 16 and 17 in that it may justify otherwise *prima facie* discrimination. Therefore, not petitioner but our opponents had the burden of proving that the higher charge against automobiles was justified by greater than average labor savings, which, as the Commission found (R. 677), is not the fact. If they failed to discharge that burden, it is because, as they well know, the facts were otherwise.

IV

Our opponents' briefs present a misleading picture of the record.

Because it would be impossible within a brief of any reasonable length to expose each and every half-truth and specious contention to be found in our opponents' briefs, we have culled just a few from each.

A

Brief for the Federal Maritime Commission

(1)

"No other shipper of automobiles protested the method of assessment (R. 633) although one common carrier of VW's, Wallenius Lines, refused to pay

---

on top of the pre-existing charges, and if we don't have the pre-existing charges there is no real basis for us to show what the percentage of increase is in this proceeding.

Mr. Zimmerman: You have on the record a statement of what the costs were at the beginning of the mechanization fund. In the absence of any evidence to the contrary, that gives you your percentage. I don't know as it is necessary to go into details of later costs" (R. 141).

its assessments upon learning in 1963 of Volkswagen's action (R. 632, fn. 20)'' (FMC Br. 8).

The inference which the Court is invited to draw is that petitioner's grievances cannot have much substance since it was the only shipper of automobiles to protest the PMA assessment. This statement is a half-truth and the inference which the Court is invited to draw therefrom is wholly false.

There is no evidence that any other commercial shipper of automobiles uses chartered vessels. On automobiles transported by common carrier, the assessment, like all stevedoring charges, is paid by the vessel. The shipper pays freight only. When the hearing was held herein, steamship freight rates on automobiles had not increased (R. 633). The Army, however, which like petitioner pays its own stevedoring costs, did complain of the use of measurement tons for the Mech Fund assessments and, in fact, refused for some period of time to pay such assessments on its vehicles (R. 518, 489, 357). In addition, the Hanseatic Vaasa Line, a non-PMA member, a carrier and MTC's largest automobile account after petitioner, likewise protested the assessment (R. 238-239).

Thus, the truth is that petitioner, far from being alone and unique in finding PMA's plan unfair to automobiles, was joined by the United States Army and by the carrier most directly affected.

(2)

''That assessment, standing alone, did not involve any charges by PMA to customers or clients of PMA's membership (R. 638). One member of PMA in fact who was handling Volkswagens paid the assessment until it learned that MTC was not paying the assessment (R. 632, footnote)'' (FMC Br. 19).

The support for the assertion that one member of PMA paid the assessment for a period is a finding in a footnote

regarding the Wallenius Lines. As the Examiner observed, this is an "independent carrier" which means that it is not a member of PMA (R. 538-587). Thus, the sentence that PMA's assessment "did not involve any charges by PMA to customers or clients of PMA's membership" is also necessarily false. Whatever this carrier paid toward the Mech Fund must have been passed on to it as a customer or client of one of PMA's members.

(3)

> "MTC's individual decision to pass the cost on to Volkswagen is the specific act which led to and gave rise to this litigation, not the assessment among PMA's membership" (FMC Br. 19).

Contrast this effort to represent MTC's passing-on to petitioner of the PMA assessment as its unilateral act with MTC's description of its position in a brief filed below:

> "Apparently, petitioner would require MTC either to resign from PMA altogether and refrain from contributing to the mech fund, or, alternatively, to raise a major portion of the assessments attributable to petitioner's automobiles from other customers. The total impracticality of either alternative is self-evident. Aside from the fact that resignation would jeopardize MTC's continued ability to operate, it would not enable it to avoid the union's insistence on a contract imposing at least similar if not greater burdens on MTC. Alternatively, should MTC assess a higher charge against other cargo than competing stevedores in order to reduce the charges to petitioner, it would soon lose such other cargo to its competitors." Answering Brief of Intervenor Marine Terminals Corporation, 17.

(4)

> "Upon the evidence presented to it the Commission found no agreement which had a direct competitive effect upon shippers" (FMC Br. 23).

The Commission made no such finding. It never looked for the effect which the agreement actually had upon shippers. It makes very explicit in its opinion—and this is one of the grounds of error urged by petitioner—that it considered the terms of the agreement (R. 675), not its effect, as critical.

(5)

Defending the Commission's holding that petitioner had established no unjust and unreasonable practice in violation of section 17, its counsel says that the Commission found "that there was a sound business basis for the assessment as derived by PMA. The basis of the assessment was derived through the business judgment of PMA" (FMC Br. 30).

The Commission made no finding whatever with reference to "the business judgment of PMA." The Examiner had deliberately refused to "comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement" (R. 653).

The Commission paralleled his approach, and in discussing section 17, confined itself to what MTC had done. It said in this connection:

> "The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of 'Mech' fund assessment on automobiles, have offered to pass on only a part of the assessment" (R. 677).

The "respondents" to which the Commission referred are MTC, not PMA. PMA was an intervenor, not a re-

spondent. MTC, not PMA, sought to change the assessment and offered "to pass on only a part."

(6)

> "The petitioners have conceded that section 16 of the Shipping Act, 1916, was not violated" (FMC Br. 26).

This contention is as false as it is irresponsible. From the inception of this proceeding, in the very complaint with which it began, petitioner has consistently asserted violation of section 16 (R. 14). Counsel for the Commission purport to find this wholly imaginary concession in petitioner's brief to the Examiner wherein petitioner, recognizing that the Examiner was bound by prior administrative decisions, made clear that it was raising the point so as "to preserve the issue * * * if this case should reach the Commission itself" (R. 652). When that eventuality occurred, this is exactly what petitioner did, taking specific exception to the Examiner's conclusion that there had been no violation of section 16 (R. 664).

B

Brief for Intervenor Marine Terminals Corporation

(1)

Attacking the Solicitor General for correctly denominating the proceeding launched by PMA against MTC a "friendly suit," MTC continues:

> "[I]t is the kind of inflammatory, misleading and unsupported allegation with which the Government's brief abounds. The impression it seeks to create of VW being 'victimized by a monopolistic combination of maritime firms' and as a result having 'to yield to the marine terminal companies' demand that it shoulder the burden of the assessment' (Br. 23) is

> completely false, and the Government's generous use of loaded adjectives does not cure its error. *The interests that bind MTC to VW, its prime customer, are at least as powerful as those that bind it to PMA, its collective bargaining association*" (MTC Br. 3-4) (emphasis supplied).

MTC's counsel must surely know that it is not the Government which is seeking to impose upon this Court. VW may supply ten percent of MTC's business, but PMA controls its right to operate at all. Its brief to the court below more accurately reflected its actual position (p. 17, *supra*).

The very vigor with which MTC challenges VW before this Court, its dutiful echoing of PMA to the point where it "adopts" (MTC Br. 1) PMA's statement of facts, belie its attempt to represent itself as a genuine adversary to PMA. If the proceeding between them were honestly antagonistic, MTC would be supporting VW's position since, if VW prevails, the judgment in the pending District Court action must go in favor of MTC. Yet MTC is bending every effort to ensure that PMA wins. What could be friendlier?

(2)

> "While the Examiner found MTC to be a person subject to the Act (R. 641-642, 672), the Commission refused to do so and simply 'assumed', without deciding, that MTC was subject to the Act for purposes of the decision. (R. 673)
>
> The threshold jurisdictional issue, properly passed by the Commission because its other rulings were dispositive, has therefore not been decided" (MTC Br. 10).

What the record shows is that the only assumption made by the Commission regarding jurisdiction was as to the members of PMA as a group (R. 673).

But MTC fell into a different category. First, MTC had been explicitly found by the Examiner to be covered by the Shipping Act (R. 641-642). Second, MTC had filed an exception to this determination (R. 665). Nevertheless, the Commission reviewed under section 17 the propriety of MTC's passing on of the Mech Fund assessment (R. 676-678). In doing so it necessarily resolved adversely to respondent the jurisdictional question which MTC had placed before it. Thus the threshold jurisdictional question has been decided.

(3)

> "In fact, the United States Army, another major shipper of automobiles as well as containers contracting for its own stevedore services, accepted the assessments. (R. 105-106, 108-109, 121)" (MTC Br. 13).

This is another half truth. What MTC deliberately omits to mention is that the Army for a period of time strenuously contested the assessment on the basis of measurement tons and for a time refused to reimburse their stevedores for such charges (R. 489, 509, 518, 354). As Commissioner Hearn noted, PMA was apprehensive that if Volkswagen was given relief, "the Army would be next in line; '. . . they are still querulous about the propriety of such contributions'" (R. 725).

C

Brief for Pacific Maritime Association, Intervenor

(1)

> "The Committee [appointed by PMA to develop recommendations for allocation of the Mech Fund] did not, prior to the issuance of its report, make any study of the extent to which stevedores handling automobiles could effect savings as compared with

> the costs of the plan (i.e., the productivity approach, which the Committee rejected as unworkable in practice). * * * The Committee did not specifically discuss automobiles prior to the issuance of its report (R. 102a; 111a)" (PMA Br. 6, n. 6).

This statement gives only half the facts. Although the Committee "did not specifically discuss automobiles" before PMA's plan went into effect, PMA's Board of Directors most certainly did, as that body's own minutes disclose (R. 370). Furthermore, it is evident in context that the Board's discussion was sparked by consciousness that the plan hit automobiles particularly hard.

(2)

> "Volkswagen also represented to PMA that freight on automobiles in offshore trades is determined by unit and that tonnage dues in respect to handling of automobiles are paid variously by unit, weight and measurement. (R. 218a; 511a) These representations are contrary to fact but have been repeated by petitioner without noting that the findings establish (1) Volkswagen knew MTC tonnage dues on the handling of its vehicles were computed and paid on a measurement basis (R. 621a; 160a-161a); (2) freights are 'dependent upon measurement' in the offshore trades regardless of how tariffs are quoted. (R. 621a; 670a)" (PMA Br. 10, n. 10).

There is no inconsistency between the finding that MTC's tonnage dues were paid on a measurement basis and our statement that tonnage dues are paid variously by unit, weight and measurement. MTC are only two of the companies discharging automobiles. The record shows that except for MTC, all the stevedoring contractors discharging Volkswagen automobiles paid on the basis of weight and that the dues of one independent carrier were paid on the basis of units (pp. 11-12, *supra*).

The findings completely corroborate Volkswagen's representation that:

> "Ever since Volkswagens were first shipped to the Pacific Coast in 1954, they have been freighted on a unit basis, or on lumpsum FIO or time charter" (R. 511).

What the Commission found was:

> "There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are *on a unit basis* but dependent upon measurement" (R. 669-670) (emphasis supplied).

(3)

> "The Commission rejected such mechanical application of the Act, but insisted that collective undertakings encompassed within Section 15 must involve those activities *affecting ocean transportation,* which the Act promotes or restrains" (PMA Br. 23) (emphasis supplied).

The Commission said not a word regarding "ocean transportation." The Examiner had attempted to exclude PMA's agreement from section 15 on the theory that section 15 does "not require the filing of cooperative working arrangements that did not pertain to ocean transportation" (R. 647).

Before the Commission, petitioner challenged both this interpretation and its application to the facts of this case. Very different grounds were given by the Commission for excluding PMA's agreement from section 15, indicating that the Commission did not agree with the Examiner's formulation.

(4)

> "[T]he Commission has determined that agreements *relating* to collective bargaining are not within its jurisdiction" (PMA Br. 33) (emphasis supplied).

What the Commission did was note that the courts in construing the Interstate Commerce Act "have determined that agreements which affect *only* labor-management relations do not come within its scope" (R. 675) (emphasis supplied). But the Commission did not place its exclusion of PMA's agreement from section 15 on this ground, and the Examiner had explicitly rejected the argument that the Commission lacked jurisdiction "of the agreement establishing the method of collecting the Mech Fund because it is a part of a collective bargaining agreement" (R. 649).

(5)

> "Volkswagen has asserted the existence of a 'cat's paw' conspiracy. The argument is that PMA, with the help of ILWU, has compelled Volkswagen, as an outsider, to contribute to the mechanization fund under a special formula designed to transfer to Volkswagen labor costs which the liner interests of PMA would otherwise have to assume.
>
> The Examiner noted that these contentions were first propounded after the hearing had terminated * * *" (PMA Br. 34).

The contention which the Examiner mistakenly claimed to have been advanced for the first time by VW in its briefs had nothing to do with the ILWU or what PMA terms the " 'cat's paw' theory." VW's contention related solely to PMA and was that "the 'liner' or 'common carrier' interests dominate PMA, particularly in its actions with regard to the Mech Fund assessment" (R. 649, n. 42). How the Examiner could have characterized this contention as raised belatedly is difficult to understand, since the nature of VW's interrogation had given clear notice of its position. The very first witness VW called was PMA's vice-president, and among the questions first addressed to him were queries regarding who controlled PMA (R. 71-75).

D

Brief on Behalf of International Longshoremen's and Warehousemen's Union as Amicus Curiae in Support of Judgment Below.

(1)

> "The agreement that each employer would comply with the Association's formula and not seek to upset it, thereby jeopardizing the whole enterprise, was the *quid pro quo* for the union's agreement not to insist upon writing any formula into the contract. * * *
>
> If one shipper may upset these collective bargaining arrangements by utilizing a strained interpretation of the Shipping Act, then the entire agreement is undermined and the door is open to similar action by other shippers, with the result that shambles may be made of the industry-wide financing of the Mech Fund" (ILWU Br. 10-11).

A careless reader might assume that VW was guilty of going back upon the agreement reached with the Union. In fact, VW was not a party to that agreement and was not consulted regarding it. It is not an "employer" under the terms of that agreement.

What the ILWU is asserting is that no matter what the impact on petitioner of the Union's agreement with PMA, VW should be foreclosed from objecting.

Conclusion

This Court is urged to nullify the Shipping Act and not to interfere with PMA's enrichment of its membership at the expense of petitioner on the ground that action by this Court would jeopardize labor peace on the Pacific waterfront. The ILWU, which, of course, is the beneficiary of whatever is exacted from petitioner by PMA, asserts that to apply section 15, although not sections 16 and 17,

will have a disastrous effect upon the West Coast longshore industry (ILWU Br. 18).

According to ILWU, under the terms of the collective bargaining agreement, PMA will have to refund the moneys already collected and payments to retired dock workers will precipitously come to a halt.

We question whether the agreement compels these results. But even if such construction were correct, what was decided by agreement can equally well be changed by agreement. And the doctrine of *pari delicto* would seem to stand squarely in the way of any attempt by PMA's membership to compel PMA, because of failure to comply with the Shipping Act, to refund the amounts collected. *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation* Co., 159 F.2d 306, 312 (4th Cir. 1947), *cert. denied,* 331 U.S. 827 (1947). If PMA and the ILWU sincerely wish to avoid labor controversy, we think it lies in their power to resolve peacefully any problems which PMA has created by its disregard of the Shipping Act.

But even if our opponent's fears were better grounded, there are other considerations which take precedence over industrial peace even for the most devoted union member. One is that we enjoy a government of laws, not of men, administered by courts operating free of fear or coercion. If labor peace can only be bought by ignoring the clear mandate of the Shipping Act, by denying petitioner the protection of the laws enacted by Congress, and by licensing private rule over our foreign commerce, then too high a price will have been paid.

One-half century ago Congress concluded that the exercise of collective power in the shipping industry requires governmental supervision. The wisdom of that decision is demonstrated by the way PMA has used its governmental-like powers to victimize a shipper employing transportation competitive with that provided by its members. Section 15

of the Shipping Act squarely covers PMA's cooperative working agreement and sections 16 and 17 equally call for condemnation of the discriminatory scheme PMA has embraced. We are confident that this Court will not permit the extraneous considerations which our opponents have introduced to influence its determination of the issues presented by this appeal.

Dated: November, 1967.

Respectfully submitted,

WALTER HERZFELD
Attorney for Petitioner

CECELIA H. GOETZ
BERNARD J. WALD
HERZFELD & RUBIN

RICHARD A. WHITING
ROBERT J. CORBER
STEPTOE & JOHNSON

STANLEY J. MADDEN
PILLSBURY, MADISON & SUTRO
Of Counsel